In the

Court of Appeals

of the

United States

For the Ninth Circuit

No. 12459

In the Matter of the Application for a Writ of Habeas Corpus of TOM KING, *Appellant,*

v.

JOHN R. CRANOR, as Superintendent of Washington State Penitentiary at Walla Walla, Washington, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE

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COUNTER-STATEMENT OF THE CASE

Appellant was charged with the crime of assault in the first degree in Grant County, Washington. Following a general verdict by the jury of guilty upon the assault charge (Tr. 33) a supplemental information was filed charging appellant with being an habitual criminal. After a trial on the habitual criminal charge (Tr. 41-42) a special verdict was found by the jury that appellant was

guilty of being an habitual criminal (Tr. 33). Thereupon the court sentenced appellant to the Washington State Penitentiary for the remainder of his natural life (Tr. 34). Appellant contends that the conviction on the charge of being an habitual criminal is void because the evidence supporting such conviction is insufficient and that the judgment and sentence of life imprisonment was imposed in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. Appellant contends also that he was compelled to stand trial on the supplemental information of being an habitual criminal without prior notification as to the nature and cause of the accusation against him, in violation of his rights under the Sixth Amendment to the Federal Constitution. Appellant does not attack the trial and conviction on the charge of assault in the first degree.

ARGUMENT

1. Appellant has failed to maintain the burden of proving that his conviction on the charge of being an habitual criminal was a violation of due process.

The minutes of the trial on the habitual criminal charge (Tr. 41, 42, 43) disclose that appellant was present in person and with his attorney and that certified copies of an information, judgment and sentence from Oklahoma and an information, judgment and sentence from Montana were received in evidence. They disclose that further evidence and testimony were admitted and that the jury was instructed by the court. There is nothing in the record indicating that appellant objected to any of this evidence.

The Supreme Court of the United States has held that a presumption of regularity attaches to the judgment of a court, and that while a petitioner who alleges facts setting forth a *prima facie* case for a writ of *habeas corpus* is entitled to an opportunity to be heard, he must prove those allegations. He has the burden of convincing the court by a preponderance of evidence that a judgment against him was made in violation of his constitutional guaranty. See *Johnson v. Zerbst,* 304 U. S. 458, 468, 58 S. Ct. 1019, 1025, 82 L. Ed. 1461, 146 A. L. R. 357; *Foster v. Illinois,* 332 U. S. 134, 137, 67 S. Ct. 1716 1718, 91 L. Ed. 1955. At the hearing upon the petition for a writ of *habeas corpus* in the district court appellant was once more given an opportunity to be heard. Although he was personally present, again he offered nothing in support of his allegations in the pleadings that his conviction on the charge of being an habitual criminal was based on insufficient evidence. He has patently failed to sustain his

burden of proof that such conviction and judgment were in violation of the due process clause of the Federal Constitution.

It is appellant's contention that he was obliged to stand trial on the supplemental information without prior notification as to the nature of the charge against him in violation of the Sixth Amendment. The requirements of the Sixth Amendment are applicable only to Federal courts. In *Foster v. Illinois, supra,* the court said:

> "The 'due process' of law which the Fourteenth Amendment exacts from the States is a conception of fundamental justice * * *. It is not satisfied by merely formal procedural correctness nor is it confined by any absolute rule such as that which the Sixth Amendment contains in securing to an accused 'the assistance of counsel for the defense.' By virtue of that provision, counsel must be furnished to an indigent defendant prosecuted in a federal court in every case whatever the circumstances * * *. Prosecutions in state courts are not subject to this fixed requirement. So we have held upon fullest consideration. *Betts v. Brady, supra.* The process of law in order to be 'due' does require that a state give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a 'particular situation' assignment of a counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence * * *. Such need may exist whether an accused contests a charge against him or pleads guilty."

The reasoning in the *Foster* case is equally available in the present cause. Notice of the nature and cause of the charge against an accused, and a fair and adequate opportunity for preparation and presentation of his defense is a prerequisite of substantive due process. It is appellee's contention that this prerequisite has been met in the instant situation. So far as notice of the nature and

cause of the charge against appellant is concerned the minutes of the trial on the supplemental information show that the information was read by the prosecuting attorney in the presence of appellant and his attorney and that appellant pleaded not guilty thereto (Tr. 41). In regard to the right of continuance, in *Avery v. Alabama,* 308 U. S. 444, 450, 60 S. Ct. 321, 324, 84 L. Ed. 377, it was held that the trial court's denial of a request by counsel for continuance on the ground of lack of time to prepare a defense was not a denial of the constitutional right to assistance of counsel where counsel failed to show that continuance would have enabled him to present a stronger defense. In the present case there was not even a request for a continuance in spite of the fact, as stated in the affidavit of the prosecuting attorney (Tr. 36), that the question of continuance was discussed after the supplemental information had been filed. Appellant had the benefit of competent counsel who, it must be presumed, would have seasonably objected to an unreasonably summary procedure. In a matter, the knowledge of which was peculiarly within the province of appellant, to wit, the question of his identification as the defendant in the Oklahoma and Montana judgments, appellant chose not to testify. Nor does the record disclose that any objection was made at the trial to testimony submitted in support of the proposition that he was, in fact, the accused in those prior judgments.

Moreover, on the hearing in the district court from which this appeal is directed, appellant failed to offer anything in his pleadings or in evidence beyond his uncorroborated allegations that he had not previously been convicted of felonies. Appellee submits, then, that the

petitioner in a *habeas corpus* proceeding has the burden of proving that his conviction was rendered in violation of the constitution and that appellant here has not sustained that burden.

2. Even if part of the judgment and sentence under authority of which appellant is confined were illegal, appellant is nevertheless deprived of his liberty by virtue of a valid judgment and sentence.

Assuming for this argument that all of appellant's allegations are true, he has failed to state a cause of action for a writ of *habeas corpus* to issue. It is a recognized principle of the law on Judgments that an invalid portion of a judgment, if separable, will be treated as surplusage, and that the remainder shall be effective so far as it was within the power of the court to render.

> "* * * If the void portion of the judgment does not effect the whole with invalidity and may be separated from the remainder and treated as surplusage, the judgment will not be avoided in toto, but will be upheld as to that portion which was within the jurisdiction and power of the court to render * * *." Freeman on Judgments, Fifth Edition, Volume 1, page 648, § 324.
>
> "On error proceedings it is not always necessary to reverse an improper sentence, for where a part is illegal, the appellate court may, if the sentence is divisible, modify it by striking out the illegal part and affirming the balance." 15 Am. Jur. 121, Criminal Law, § 463.

Nowhere does appellant complain of his conviction on the charge of assault in the first degree. In fact, appellant claims that the judgment and decree of the Superior Court of the State of Washington for Grant County sentenced him to life imprisonment for the crime of first degree assault (Brief of Appellant, 7). Under Washington law this was a valid judgment and sentence for the crime

of assault in the first degree. Chapter 249, section 161, Laws of 1909 (Rem. Rev. Stat. 2413) provides that a person guilty of assault in the first degree shall be punished by imprisonment in the state penitentiary for not more than five years. Chapter 114, section 2, Laws of 1935 (Rem. Rev. Stat. Supp. 10249-2) provides that when a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years or of being an habitual criminal, the court shall sentence such person to the penitentiary and shall fix a maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted if the law provides for a maximum term. *If the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term which may be for any number of years up to and including life imprisonment.* Since, therefore, that portion of the judgment which sentences appellant to life imprisonment for the crime of assault in the first degree is valid, the writ of *habeas corpus* is not available. In *McNalley v. Hill,* 293 U. S. 131, 137, 138, 55 S. Ct. 24, 27, 79 L. Ed. 238, a petitioner for a writ of *habeas corpus* who was sentenced on three separate counts, the second and third of which were to run consecutively, assailed the conviction and sentence on the third count as void. On the face of the petition it appeared that his detention was lawful under the sentence on the second count. The court held that there was no occasion in a proceeding in *habeas corpus* for an inquiry into the validity of his conviction and sentence under the third count.

> "There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentary on the English common law * * *
>
> "Considerations which have led this Court to hold that habeas corpus may not be used as a writ of error to correct an erroneous judgment of conviction of crime but may be resorted to only where the judgment is void because the court was without jurisdiction to render it (Citations omitted) lead to the like conclusion where the prisoner is lawfully detained under a sentence which is invalid in part. Habeas corpus may not be used to modify or revise the judgment or conviction * * *."

This principle was repeated in *Eagles v. U. S. ex rel. Samuels*, 329 U. S. 304, 307, 67 S. Ct. 313, 315, 91 L. Ed. 308. Appellee submits that at least the unassailed portion of the trial judgment is sufficient under the laws of the State of Washington and the United States to support a sentence of life imprisonment and that therefore the writ of *habeas corpus* may not be invoked.

CONCLUSION

It is appellee's position that appellant has failed to prove by a preponderance of evidence that his conviction and sentence in the Superior Court of the State of Washington for Grant County was rendered in violation of any personal right guaranteed under the Fourteenth Amendment to the Federal Constitution. It is also appellee's position that even if that portion of the judgment rendered against appellant which adjudges him to be an habitual criminal is unconstitutional and void, the remainder of the judgment and sentence is valid, and appellant may not therefore avail himself of the writ of *habeas corpus* and that the order of the District Court in this case denying appellant's petition for the writ must be affirmed.

Respectfully submitted,

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